

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

MANUEL BURNLEY, JR., et al.,

Plaintiffs,

-vs-

Case No. 19-CV-364

Judge J.P. Stadtmueller

VILLAGE OF BROWN DEER, et al.,

Defendants.

Video examination of DEVON KRAEMER,
taken at the instance of the Plaintiffs, under and
pursuant to the Federal Rules of Civil Procedure,
before JENNIFER L. SCHMALING, a Registered Merit
Reporter, Certified Realtime Reporter, Certified
Realtime Captioner and Notary Public in and for the
State of Wisconsin, at Samster, Konkel & Safran, S.C.,
1110 North Old World Third Street, Suite 405,
Milwaukee, Wisconsin, on September 30, 2019,
commencing at 10:14 a.m. and concluding at 4:43 p.m.

WIRTH DECLARATION EXHIBIT 4

1 A P P E A R A N C E S

2
 3 PEOPLE'S LAW OFFICE, by
 4 MR. G. FLINT TAYLOR,
 5 MR. BEN H. ELSON,
 6 1180 North Milwaukee Avenue, Third Floor,
 7 Chicago, Illinois 60642,
 8 appeared on behalf of the Plaintiffs.

9
 6 GUNTA LAW OFFICES, S.C., by
 7 MR. JOHN A. WOLFGANG,
 8 9898 West Bluemound Road, Suite 2,
 9 Wauwatosa, Wisconsin 53226,
 10 appeared on behalf of the Defendants.

11
 12 A L S O P R E S E N T

13 Ms. Stephanie Olson, Videographer, Brown & Jones
 14 Reporting, Inc.
 15 Chief Michael Kass, Brown Deer Police Department.

16 * * * * *

17
 18 I N D E X

19	Examination:	Page
20	By Mr. Taylor.....	6
21		
22	Exhibits Identified:	Page
23	Exhibit 1 - Brown Deer Officer Defensive Action Report.....	123
24	Exhibit 2 - Milwaukee Police Department Incident Report Dated 3/16.....	123
25	Exhibit 3 - Officer Defensive Action Report By Officer Leeman.....	137
	Exhibit 4 - Milwaukee Police Department Incident Report By Detective James Hutchinson...	159
	Exhibit 5 - Occupational Debrief Assessment Of Ms. Devon Kraemer For The Village Of Brown Deer By Daniel Schroeder, Ph.D, Dated April 14, 2016.....	229

26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

<p style="text-align: center;">3</p> <p>1 INDEX CONT'D</p> <p>2 Exhibits Identified: Page</p> <p>3 Exhibit 6 - Milwaukee Police Department Incident</p> <p>4 Report By Detective James Hensley.....258</p> <p>5 Exhibit 7 - Employer Certification Duty Disability. 261</p> <p>6 Request By: Page</p> <p>7 By Mr. Taylor -Devon Kraemer To Preserve Her</p> <p>8 Personal File..... 140</p> <p>9 *****</p> <p>10 Disposition Of Original Exhibits:</p> <p>11 Attached To Original Transcript</p> <p>12 *****</p> <p>13 *****</p> <p>14 *****</p> <p>15 *****</p> <p>16 *****</p> <p>17 *****</p> <p>18 *****</p> <p>19 *****</p> <p>20 *****</p> <p>21 *****</p> <p>22 *****</p> <p>23 *****</p> <p>24 *****</p> <p>25 *****</p>	<p style="text-align: center;">4</p> <p>1 TRANSCRIPT OF PROCEEDINGS</p> <p>2 THE VIDEOGRAPHER: We are officially</p> <p>3 on the record at 10:14 a.m. Today's date is</p> <p>4 September 30th, 2019. This is disk No. 1 in</p> <p>5 the deposition of Devon Kraemer.</p> <p>6 This deposition is being taken in the</p> <p>7 matter of <i>Manuel Burnley, Jr., et al., vs. The</i></p> <p>8 <i>Village of Brown Deer, et al.</i> This matter is</p> <p>9 pending in the United States District Court for</p> <p>10 the Eastern District of Wisconsin, Case</p> <p>11 No. 19-CV-364.</p> <p>12 This deposition is taking place at</p> <p>13 Samster, Konkel & Safran, S.C., located at 1110</p> <p>14 North Old World Third Street, Milwaukee,</p> <p>15 Wisconsin 53203. My name is Stephanie Olson,</p> <p>16 videographer. The court reporter is Jennifer</p> <p>17 Schmaling. Will counsel please state their</p> <p>18 appearances and whom they represent, beginning</p> <p>19 with plaintiffs' counsel, and then the reporter</p> <p>20 will swear in the witness</p> <p>21 MR. TAYLOR: I'm Flint, F-L-I-N-T,</p> <p>22 Taylor for the plaintiff.</p> <p>23 MR. ELSON: Ben Elson for the</p> <p>24 plaintiff.</p> <p>25 MR. WOLFGANG: John Wolfgang, Gunt</p>
<p style="text-align: center;">5</p> <p>1 Law Offices, on behalf of all defendants.</p> <p>2 DEVON KRAEMER, called as a witness</p> <p>3 herein, having been first duly sworn on oath,</p> <p>4 was examined and testified as follows:</p> <p>5 MR. TAYLOR: I would indicate for the</p> <p>6 record that Chief Kass, is that correct --</p> <p>7 CHIEF KASS: Correct.</p> <p>8 MR. TAYLOR: -- is also present, and</p> <p>9 you're here in what function?</p> <p>10 MR. WOLFGANG: He's here as a village</p> <p>11 representative.</p> <p>12 MR. TAYLOR: Okay. And I would</p> <p>13 indicate for the record that given the evidence</p> <p>14 that has been developed to date that he may</p> <p>15 well be a witness in the case and so that we</p> <p>16 would have an objection for him to be here at</p> <p>17 this point since he's not a defendant at this</p> <p>18 point.</p> <p>19 He may be representing the defendant</p> <p>20 city or Brown Deer in some kind of capacity,</p> <p>21 although at this point, Brown Deer is only a</p> <p>22 defendant -- as a respondeat superior defendant</p> <p>23 and not as a Monell defendant. So the fact</p> <p>24 that he's not a defendant at this point, I would ask</p> <p>25 potential witness at this point, I would ask</p>	<p style="text-align: center;">6</p> <p>1 that he be excluded.</p> <p>2 MR. WOLFGANG: Well, I note your</p> <p>3 objection, and I believe the village has a</p> <p>4 right to have him here, and he will be staying</p> <p>5 unless the Court asks him to leave.</p> <p>6 MR. TAYLOR: Well, we won't make an</p> <p>7 issue of it now. It may become an issue later.</p> <p>8 MR. WOLFGANG: It may be.</p> <p>9 EXAMINATION</p> <p>10 BY MR. TAYLOR:</p> <p>11 Q Could you state your name and spell your last</p> <p>12 name for the record, please?</p> <p>13 A Devon Kraemer, K-R-A-E-M-E-R.</p> <p>14 Q All right. And you understand you're a</p> <p>15 defendant in this case; is that correct?</p> <p>16 A Correct.</p> <p>17 Q Now, you're represented by counsel here; is</p> <p>18 that right?</p> <p>19 A Correct.</p> <p>20 Q And you've consulted with counsel today; is</p> <p>21 that correct?</p> <p>22 A We've met, yes.</p> <p>23 Q And you were previously charged with a criminal</p> <p>24 offense charged battery in this case; is</p> <p>25 that correct?</p>

143

1 those text messages that you exchanged with
 2 various people with regard to this incident?
 3 **A To preserve them, no.**
 4 Q And were they -- You didn't tender them to the
 5 District Attorney's Office?
 6 **A I believe they had a Subpoena for my texts for**
 7 **about 72 hours following the incident, so I**
 8 **think they obtained that on their own.**
 9 Q All right. They actually obtained that?
 10 **A I'm pretty certain I remember seeing that in**
 11 **the case file.**
 12 Q Did you have to turn your phone over for them
 13 to copy relevant information from it?
 14 **A No, sir.**
 15 Q Do you know how they obtained that?
 16 **A They just would have Subpoenaed the cell phone**
 17 **company.**
 18 Q All right. So did they get actual text
 19 messages or just the people, the phone numbers
 20 of who you texted to?
 21 **A That I -- That I'm not sure about.**
 22 Q And the department didn't ask you for your
 23 phone?
 24 **A Not that I remember.**
 25 Q And the department didn't ask for any texts as

145

1 period of time?
 2 **A Yes.**
 3 Q And at that particular time when he came up and
 4 he was having verbal exchange with the bus
 5 driver and later with you, you made no effort
 6 to frisk him or search him; is that right?
 7 **A No, sir.**
 8 Q And you could observe the waist area at that
 9 time, couldn't you?
 10 **A I was -- Due to his size, it made it difficult,**
 11 **but I suppose, you know, just a video scan of**
 12 **the body. I mean, you can identify which is**
 13 **his waist area.**
 14 Q And you didn't see any bulges at the time that
 15 he walked that distance along the aisle to get
 16 to within six or eight feet of you, did you?
 17 **A No.**
 18 Q And you made no inquiry of him as to whether he
 19 was armed; is that correct?
 20 **A No, I didn't.**
 21 Q And neither did Officer Leeman; is that right?
 22 **A No.**
 23 Q And the bus driver didn't make -- tell you that
 24 she suspected that he had any kind of weapon?
 25 did she?

144

1 part of any investigation that they might have
 2 done?
 3 **A No, sir.**
 4 Q Now, why don't we put the video at 55:50.
 5 (Video played.)
 6 BY MR. TAYLOR:
 7 Q Let's stop right there for a moment. Do you
 8 recognize the man in the left bottom quadrant
 9 of the video at 15:55:27?
 10 **A Yes, sir.**
 11 Q And who is that?
 12 **A Manual Burnley.**
 13 Q And that was how he was dressed at the time of
 14 the incident; is that right?
 15 **A That's right.**
 16 Q And, in fact, in this particular frame, he has
 17 on a hooded sweatshirt and a hat; is that
 18 right?
 19 **A Correct.**
 20 Q And you -- And he had walked up from a seat
 21 that was perhaps halfway kind of in the middle
 22 of the bus to the front where you and Leeman
 23 were; is that right?
 24 **A Correct.**
 25 Q And you were able to observe him during that

146

1 **A No, she didn't.**
 2 Q Now -- Okay. Go ahead on.
 3 (Video played.)
 4 BY MR. TAYLOR:
 5 Q That's you talking at that point, correct?
 6 **A Yes.**
 7 Q And we're at 15:55:41, and you and he are -- Is
 8 that where you are telling us that he was -- he
 9 was loud and angry at that point?
 10 **A Even before that, yes.**
 11 Q Okay. So -- But is that an accurate tone of
 12 voice that's being reflected at 15:55 in terms
 13 of your tone of voice and also his tone of
 14 voice in your exchange with him?
 15 **A It's a representation. But being there**
 16 **firsthand, I had a, you know, different -- I**
 17 **was able to witness it firsthand what it**
 18 **actually felt like and sounded like.**
 19 Q Okay. Well, are you saying it didn't sound
 20 like what we're hearing here in terms of the
 21 loudness of it? Was your voice louder and his
 22 voice was louder, or was your voice the same
 23 and his voice louder, or was his voice the same
 24 and your voice louder?
 25 **A Well, I can speak of Mr. Burnley's tone. The**

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 4 of 21 Document 45-4

147

1 **muscles in his throat were clenching. He was**
 2 **shouting so loud, and that's not depicted on**
 3 **the video.**
 4 Q So you're saying that his throat was clenching?
 5 **A Well, when somebody's shouting or screaming,**
 6 **you can usually see the muscles in their throat**
 7 **clenching based on them straining to use their**
 8 **voice. That's what I mean.**
 9 Q And so you're saying that even though it
 10 doesn't sound like he's shouting here that, in
 11 fact, it's your interpretation that he was
 12 shouting?
 13 **A He was shouting.**
 14 Q All right. And he was shouting when he
 15 would -- at this particular point on the video.
 16 Is that your testimony?
 17 **A Yes, sir.**
 18 Q All right. In this particular frame, this is
 19 where Officer Leeman starts to come onto the
 20 bus. Is that Officer Leeman we see in the
 21 right bottom quadrant?
 22 **A Yes, sir.**
 23 Q And we're again at 15:55:45. Okay. Why don't
 24 we continue.
 25 (Video played.)

149

1 conclusion that he might have a mental issue,
 2 right, because of his body odor, right?
 3 **A And other things that I was observing.**
 4 Q Well, body odor No. 1, right?
 5 **A I don't know if I would rate that as No. 1,**
 6 **but --**
 7 Q Well, I'm saying that was one?
 8 **A Yes. That was a clue to me.**
 9 Q And another was the fact that he seemed
 10 agitated, right?
 11 **A That was another one.**
 12 Q And he was speaking in a loud tone of voice,
 13 right?
 14 **A There was an overexaggeration of emotion given**
 15 **to a rather minor incident.**
 16 Q It was an incident over whether he should have
 17 \$3 refunded, correct?
 18 **A Yes.**
 19 Q That he had paid to get on the bus, correct?
 20 **A That's correct.**
 21 Q And when you first came on the bus, he
 22 wasn't -- he was just sitting there on his cell
 23 phone, right?
 24 **A Yes, he was.**
 25 Q And for the next few minutes, he continued to

148

1 BY MR. TAYLOR:
 2 Q All right. Stop right there. Okay. So now
 3 we're -- Is that accurately how you and Leeman
 4 took him off the bus, what we just saw at
 5 15:55:49?
 6 **A Can you describe what you mean by "accurately"**
 7 **or what --**
 8 Q Well, I mean, does that accurately depict how
 9 you and Leeman grabbed his arms and escorted
 10 him off the bus?
 11 **A I guess from a visual standpoint. But, again,**
 12 **it doesn't speak to what his strength felt**
 13 **like, his body odor, the sound of his voice.**
 14 **It doesn't at all portray the totality of the**
 15 **circumstances.**
 16 Q All right. But it does portray the physical
 17 positions of all three of you, doesn't it?
 18 **A Yes, it does.**
 19 Q All right. But you're -- You say that there's
 20 other aspects that you want to add to the
 21 equation; is that correct?
 22 **A Well, just my observations.**
 23 Q Okay. And conclusions, correct?
 24 **A Yes, sir.**
 25 Q 'Cause at this point, you're making a

150

1 sit there on his cell phone as you had a
 2 conversation with the bus driver, right?
 3 **A Right.**
 4 Q And then after the bus driver reluctantly
 5 attempted to point out who it was that she was
 6 complaining about, you looked at him, correct?
 7 **A Yes, sir.**
 8 Q And that's when -- Did you ask him then to come
 9 forward?
 10 **A I know that now from reviewing the tape.**
 11 Q So that there -- That wasn't part of your
 12 memory, but the tape refreshed your
 13 recollection as to that?
 14 **A Yes.**
 15 Q Is that correct?
 16 **A Yes, sir.**
 17 Q And so that's when he comes forward along the
 18 aisle and gets to the point that we see in this
 19 video and now this part of the video, and then
 20 you escort him out when he refuses to leave
 21 voluntarily; is that right?
 22 **A Yes, sir.**
 23 Q Now, at that point, you had given him the
 24 opportunity of leaving the bus voluntarily or
 25 being cited for disorderly conduct; is that

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00564-JPS Filed 11/01/19 Page 5 of 21 Document 45-4

151

1 correct?

2 **A Yes, sir.**

3 Q Now, disorderly conduct is a citation, correct?

4 **A It can be a local citation, or depending on**

5 **prior offenses, you can refer it for a state**

6 **charge.**

7 Q But it normally will not result in being taken

8 to jail, would it, unless there were some

9 warrant or some hold on him?

10 **A Well, for a municipal, we would have brought**

11 **him in and booked him. But for a state**

12 **offense, yeah, it would just be an order-in.**

13 Q And had you made a determination when you were

14 telling him, "We're going to write a citation

15 for you," at that point, you didn't intend to

16 arrest him and take him to jail, did you?

17 **A Yeah. He would have been under arrest and**

18 **transported back to the Brown Deer PD for**

19 **booking, issued a citation and released.**

20 Q So you did plan to arrest him because he didn't

21 voluntarily leave the bus; is that right?

22 **A Right.**

23 MR. TAYLOR: Okay. So why don't we

24 continue to -- when he gets off the bus. That

25 would be the next second or two.

153

1 Q And you've been an officer for over five years,

2 right? Right?

3 **A Yes.**

4 Q And dealt with many situations on the street

5 with people who had not voluntarily complied

6 with orders that you had given. Isn't that

7 fair to say?

8 **A Fair to say.**

9 Q All right. And Leeman had been an officer for

10 how long?

11 **A I don't know.**

12 Q But he was more experienced even than you,

13 correct?

14 **A No, he wasn't.**

15 Q He wasn't. He was less experienced?

16 **A He was a newer officer than I was.**

17 Q But he was an older guy, right?

18 **A Yes, older than me.**

19 Q And he had been an officer somewhere else

20 before he came to Brown Deer, correct?

21 **A I believe he was in corrections. I don't think**

22 **he actually was a sworn police officer.**

23 Q Okay. But he certainly had had experience,

24 particularly if he was a corrections officer

25 and then a police officer, in dealing with

152

1 (Video played.)

2 BY MR. TAYLOR:

3 Q Stop it right there. Okay. So this is at

4 15:55:51 on the video which would be 51

5 seconds. That indicates -- Now you have him

6 off the bus, you're on the left, and Leeman's

7 on the right, and you're each holding one arm;

8 is that correct?

9 **A Yes, sir.**

10 Q And he's in a standing position at that point,

11 correct?

12 **A Right.**

13 Q And are you -- Do you have both hands on his

14 left arm at that point?

15 **A Yes, I do.**

16 Q And Leeman has both hands on his right arm,

17 correct?

18 **A Hard to say if the video's --**

19 Q But he has him -- He does have him either with

20 one hand or two hands on the right arm,

21 correct?

22 **A Right. He's touching him.**

23 Q Right. And you're both trained police

24 officers, right?

25 **A Yes, we are.**

154

1 people who weren't voluntarily complying with

2 orders of officers, correct?

3 **A You'd have to ask him.**

4 Q Well, he was -- And he was armed in the same

5 way you were, correct?

6 **A He was carrying the department-issued firearm.**

7 Q Had you ever worked with him previously in

8 terms of making arrests or checking people in

9 to custody?

10 **A Yes, I had.**

11 Q And how often?

12 **A Well, he was new to early shift. He came from**

13 **late shift in January of that year. So we had**

14 **only been working together consistently for,**

15 **what, two, two-and-a-half months, so hard to**

16 **really quantify. I don't remember our off-day**

17 **rotation if I worked with him one day per week**

18 **or four. But, I mean, safe to say we had**

19 **certainly arrested people together.**

20 Q Had you ever been in a situation with him where

21 either of you had used a Taser?

22 **A With Officer Leeman?**

23 Q Yes.

24 **A Well, if he was on my -- I don't**

25 **believe he was on my other two use of forces**

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 6 of 21 Document 43-4

155

1 **involved in the Taser.**
 2 Q All right. And how about pulling the Taser?
 3 Was he ever on any of those occasions, other
 4 occasions, where you pulled a Taser but didn't
 5 use it?
 6 **A I can't recall.**
 7 Q All right. And did you ever have an occasion
 8 to use your baton in any circumstances prior to
 9 March of 2016?
 10 **A Not on people.**
 11 Q All right. What had you used it on?
 12 **A To smash out a window, car window.**
 13 Q Had you ever had an occasion to use OCS, or
 14 pepper spray?
 15 **A OC, no, I had never deployed it.**
 16 Q All right. Had you ever been present when it
 17 was deployed?
 18 **A No, sir.**
 19 Q All right. And prior to this occasion, had you
 20 ever used knee strikes on anybody?
 21 **A No, sir.**
 22 Q And prior to this occasion, had you ever used
 23 any kind of brachial strikes on the neck area?
 24 **A No, sir.**
 25 Q And prior to this occasion, had you ever had

157

1 Q And were you by yourself at that point?
 2 **A Yes, I was.**
 3 Q And was this a woman or a man?
 4 **A A very -- Somebody much taller than me, a male.**
 5 Q And you did that by yourself?
 6 **A Yes.**
 7 Q And you're a relatively strong person; is that
 8 right?
 9 **A I would say I'm in fairly good shape.**
 10 Q And in 2016, you were in even better shape,
 11 correct?
 12 **A Yes.**
 13 Q Because you did weight training, right?
 14 **A Yes, sir.**
 15 Q You did cardiac training, right?
 16 **A Yes, sir.**
 17 Q And you did that regularly, right?
 18 **A Yes, sir.**
 19 Q And at that time, what was your height and
 20 weight?
 21 **A I was 5 feet 5 inches tall and 140 pounds, give
 22 or take a few.**
 23 Q And how old were you?
 24 **A Twenty-six.**
 25 Q Now, the vertical wall stun that you did was

156

1 occasion to either punch or kick a person in
 2 order to subdue him or her?
 3 **A I never had used that level of force before.**
 4 Q Had you ever used either a destabilization
 5 technique either by leg whipping someone or
 6 tackling him or otherwise, or her, or otherwise
 7 bringing someone to the ground?
 8 **A I can think of a couple situations where I had
 9 to go hands-on.**
 10 Q Did you then pull that person to the ground?
 11 **A I did a vertical wall stun or up against my
 12 squad.**
 13 Q What was that?
 14 **A It was two separate.**
 15 Q Okay. What's a vertical wall stun? You throw
 16 somebody up against the wall?
 17 **A Correct.**
 18 Q And that -- You did that on one occasion?
 19 **A Correct.**
 20 Q And did that accomplish what you were
 21 attempting to accomplish in terms of
 22 stabilizing the person and keeping them from
 23 being able to subdue them?
 24 **A I was able to control them and get them in
 25 handcuffs.**

158

1 successful in subduing someone who was larger
 2 than you, correct?
 3 **A Yes, sir.**
 4 Q And what was the other occasion you said you
 5 used some kind of physical force? What did you
 6 call that?
 7 **A I -- The same thing, vertical wall stun, but it
 8 was up against the side of my squad car.**
 9 Q Okay. And was that a male or a female?
 10 **A It was a male.**
 11 Q And were you by yourself?
 12 **A Yes, sir.**
 13 Q And how big was that male?
 14 **A Probably 6 feet tall or so. I don't remember.
 15 I mean, he definitely outweighed me.**
 16 **Everybody -- Every guy outweighed me that I
 17 came into contact with.**
 18 Q So he was may be 175, 180 pounds, 6 feet?
 19 **A I don't -- I can't say one way or the other.**
 20 Q Was he thin or just regular weight in terms of
 21 what you expect a 6-foot person to be, or was
 22 he heavier than what you'd expect a 6-foot
 23 person to be?
 24 **A Well, he was of average size.**
 25 Q Okay. And the other person you said was much

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 7 of 21 Document 45-4

159

1 taller who you did a vertical stun on, wall
 2 stun, you said -- how tall was that person?
 3 **A I would also say about 6 feet tall. I mean,**
 4 **this was probably 2013, so it was a while ago.**
 5 Q And was that person, what kind of size in terms
 6 of weight?
 7 **A I just -- I mean, it's not sticking out in my**
 8 **mind as him being, like, massive. So I would,**
 9 **again, just say an average-size human being.**
 10 Q So when you sized up Mr. -- Mr. Burnley, you
 11 assumed that he was in the area of about 5-9,
 12 300 pounds, correct?
 13 **A I believe I said 3 to 400 pounds.**
 14 Q Well, you initially told Carver 300 pounds and
 15 5-9, didn't you?
 16 **A Do we have Sergeant Carver's --**
 17 Q Yeah. Let's take a look at it. Okay. Let's
 18 mark this as 3.
 19 MR. ELSON: This is 4.
 20 MR. TAYLOR: 4 already? We've got 4?
 21 (Off-the-record discussion.)
 22 (Exhibit No. 4 was marked.)
 23 BY MR. TAYLOR:
 24 Q So this is a report that purports to be an
 25 interview with Carver who recounts a discussion

161

1 squirming around, and you all are holding onto
 2 his arms, and you're having -- and he seems to
 3 be agitated and verbally agitated; is that
 4 right?
 5 **A It's blurry. Can't see anything that I'm**
 6 **doing. It's hard to make out what Officer**
 7 **Leeman's doing, and it appears that Mr. Burnley**
 8 **is almost entirely obstructed by the door of**
 9 **the bus.**
 10 Q Well, at this particular point, but you were
 11 watching it for ten seconds, you can see -- Why
 12 don't you run it back there, and we'll run it
 13 again for ten seconds. I'm talking about that
 14 ten seconds. All right.
 15 (Video played.)
 16 BY MR. TAYLOR:
 17 Q He's off the bus. There's you. There's him.
 18 There's you. You're attempting to handcuff
 19 him, correct? Both of you are trying to bring
 20 your arms -- his arms behind his back, and he's
 21 not complying. Isn't that what it appears for
 22 that ten seconds on the video?
 23 **A Yeah. It's evident he's not complying.**
 24 Q And you are -- you're Leeman has both arms
 25 to bring his -- handcuff him in the back.

160

1 he had with you on the night in question, and
 2 you notice in the second -- on the third
 3 paragraph, it says that Kraemer described the
 4 person as being 5-9 and 300 pounds. Do you
 5 have any reason to doubt that at least on the
 6 night in question, that's how you described
 7 Mr. Burnley?
 8 **A No.**
 9 Q You have no reason to doubt that, do you?
 10 **A No.**
 11 Q Okay. All right. So now we're back to the
 12 video for a moment, if we may. And we're at 55
 13 minutes and 51 seconds.
 14 MR. TAYLOR: So you want to run that,
 15 Ben?
 16 MR. ELSON: 'Til when?
 17 MR. TAYLOR: Run it 'til, good
 18 question, about 56:00 or 56:01. Run it for
 19 about 10 or 11 seconds.
 20 (Video played.)
 21 BY MR. TAYLOR:
 22 Q Okay. Stop it right there. Okay. So now
 23 we've gone for about 11 seconds from the time
 24 you have him on the ground outside of the bus,
 25 and we see from the video that he's kind of

162

1 right?
 2 **A I -- I think it shows that, but it's not, like,**
 3 **crystal clear that -- I mean, it just is all of**
 4 **us just moving around.**
 5 Q Well, you're all three standing, correct?
 6 **A Right.**
 7 Q And you still have some contact with his arms,
 8 correct?
 9 **A Yes.**
 10 Q And you -- Regardless of what the video shows,
 11 your memory tells you that you were trying to
 12 handcuff him behind his back, right?
 13 **A Yes.**
 14 Q All right. Why don't we go run it for a couple
 15 more seconds then.
 16 (Video played.)
 17 BY MR. TAYLOR:
 18 Q All right. Right there. Okay. So now we're
 19 at 56:04 and 56:05, right?
 20 **A Yes, sir.**
 21 Q And now he's on the ground, correct?
 22 **A Correct.**
 23 Q And he is taken down on the ground by Officer
 24 Leeman, correct?
 25 **A I know that now.**

WIRTH DECLARATION EXHIBIT 4

163

1 Q Okay. You knew it then, didn't you?

2 **A No, I didn't.**

3 Q When did you first learn that Leeman took him

4 down?

5 **A After I received the discovery and I saw his**

6 **statement.**

7 Q So -- You saw whose statement?

8 **A Officer Leeman's.**

9 Q So until you saw Officer Leeman's statement,

10 you didn't know whether or how Burnley was

11 taken down; is that correct?

12 **A Correct.**

13 Q And you first got Leeman's statement when?

14 **A When I received the discovery.**

15 Q And that was in November?

16 **A Yes.**

17 Q Okay. So it's your testimony that at this

18 point and as -- where you were giving official

19 reports and writing official reports, you

20 didn't know that Leeman had taken Mr. Burnley

21 to the ground rather than Burnley went to the

22 ground as part of his struggle with you and

23 Leeman. Is that fair to say?

24 **A I did not know who caused us to go to the**

25 **ground.**

165

1 **right side. It was, like, kind of on his side,**

2 **kind of in between his side and maybe a little**

3 **bit face up.**

4 Q Okay. So on his right side or on his left

5 side?

6 **A It would have been on his right side because I**

7 **still had contact with his left arm.**

8 Q So in that -- As we're looking at that now, we

9 can see -- are those his feet we see?

10 **A Probably.**

11 Q And is that his body that we see?

12 **A Yes.**

13 Q Okay. And doesn't it appear that he's on his

14 left side, not his right side?

15 **A Again, from my memory on the day of being**

16 **there, he fell more on his right arm/side. He**

17 **was facing me, so he would have had to be on**

18 **his right side if he was facing me because his**

19 **whole stomach was exposed.**

20 Q Right. So he was on -- In that frame, aren't

21 you to the left of his body as we look at it?

22 **A Right. Yeah. Yes.**

23 Q So -- and that -- And his head is facing away

24 towards the top of the screen, correct?

25 **A Correct.**

164

1 Q And when you were caused to go to the ground,

2 you hit your knees, correct?

3 **A Correct.**

4 Q And that hurt, right?

5 **A Correct.**

6 Q And at one point, you described it as, "That

7 fucking hurt," right?

8 **A Yes. Yes, it did.**

9 Q In some kind of report, right?

10 **A Right.**

11 Q Now, we're now at 56:05, so we're 15 seconds

12 into from his getting off the bus. So the

13 first 15 seconds, pretty much he's standing

14 until he goes to the ground at about the

15 15-second mark. Do you agree in terms of the

16 time frame between the time he gets off the

17 bus, "he" meaning Burnley, with you and -- and

18 Leeman's assistance to the time he hits the

19 ground is approximately 15 seconds, correct?

20 **A If that's the counter on the bus time, then**

21 **yes.**

22 Q Okay. And at this point, is it your memory as

23 well as your view of the video that Burnley's

24 on his back?

25 **A Based on my memory, he would have landed on his**

166

1 Q So he's on his right side?

2 **A That's correct.**

3 Q Okay. All right. Why don't you run a couple

4 seconds here.

5 (Video played.)

6 BY MR. TAYLOR:

7 Q All right. Stop. So you almost

8 instantaneously with him landing started to

9 give him knee strikes, correct?

10 **A Correct.**

11 Q And that was 'cause you thought he was the one

12 who caused you to hit the ground, correct?

13 **A Well, it was to gain control and compliance of**

14 **him and get him in handcuffs.**

15 Q Okay. So -- But you at that point had

16 concluded that he was -- part of his resistance

17 was -- caused you to hit the ground and hurt

18 your knee, right?

19 **A Well, I said I didn't know who caused us to go**

20 **to the ground. But based on his resistive**

21 **tension, it added to my belief that it**

22 **certainly could have come from Mr. Burnley.**

23 Q And if you knew that, in fact, he went down

24 in that manner as a result of a tackle or a leg

25 whip by your partner, would you, nonetheless,

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 9 of 21 Document 45-4

167

1 have escalated the force that you were using to
 2 start knee strikes, or would you have tried
 3 some other approach?
 4 **A I can't speculate on a hypothetical.**
 5 Q Well, I'm asking you to.
 6 **A I can't answer what I may or may not have done**
 7 **without actually being presented with that**
 8 **situation at that time.**
 9 Q Well, what caused you to knee strike him other
 10 than the fact that he had caused you in your
 11 mind to fall and injure your knee and perhaps
 12 lose control of his hand?
 13 **A Why did I knee strike him?**
 14 Q Yeah.
 15 **A Because I was attempting to gain control of him**
 16 **and place him under arrest for disorderly**
 17 **conduct.**
 18 Q And how did he -- How did he go out of control
 19 in your mind at that point? How did he become
 20 out of control?
 21 **A Well, just based on the force of us hitting the**
 22 **ground, again, with his resistive tension and**
 23 **the force and the speed in which we hit the**
 24 **ground, it was evident to me that we needed to**
 25 **get him into handcuffs ASAP.**

169

1 And at the point you're knee striking him, he's
 2 on his right side, correct?
 3 **A Yes.**
 4 Q And you're looking directly at his torso,
 5 correct?
 6 **A Correct.**
 7 Q And your knee is going -- Are you trying to
 8 knee him in the groin to disable him? Is that
 9 where your knee is pointed?
 10 **A No. It was aimed directly for his -- the**
 11 **center of his abdomen. His belly button was**
 12 **quite large based on his size, so it was an**
 13 **easy target.**
 14 Q Okay. And his shirt or hoodie was up; is that
 15 right?
 16 **A Right.**
 17 Q And you saw no weapon or anything, any object,
 18 in his waist line by his abdomen, did you?
 19 **A Well, his stomach was so large, it was hanging**
 20 **past his waistband. So his belly was**
 21 **completely obstructing his waistband,**
 22 **therefore, my ability to visually inspect what**
 23 **he had tucked in there.**
 24 Q So you didn't see a weapon protrude
 25 protruding into his abdomen, did you?

168

1 Q So you're looking at his stomach at this point,
 2 right?
 3 **A I -- I mean, I don't know where we're at in the**
 4 **order of the video, but --**
 5 Q Well, we're at 56:07, and I believe -- Why
 6 don't you run it for a second.
 7 (Video played.)
 8 BY MR. TAYLOR:
 9 Q I believe you're knee striking him, aren't you?
 10 Isn't that you knee striking?
 11 **A You can see some movement. I mean, I'm kind of**
 12 **a ways away from the screen, so --**
 13 Q Well, let's look at it again.
 14 (Video played.)
 15 BY MR. TAYLOR:
 16 Q If you want to walk up and look more closely,
 17 please, feel free to because I'm pretty sure
 18 that you knee strike him, but I want you to
 19 confirm that or not if you can't.
 20 (Video played.)
 21 BY MR. TAYLOR:
 22 Q It's pretty clearly you knee striking there on
 23 the left of his body, aren't you?
 24 **A Yes.**
 25 Q And that's at 56:07 -- 56:06, 56:07. Okay.

170

1 **A Well, no, because his stomach was covering it.**
 2 **That's the only reason why.**
 3 Q Okay. And you made no effort to reach down and
 4 pat underneath his stomach to see if there
 5 might be something there that you hadn't
 6 observed when you saw him walk up to you in the
 7 bus; is that right?
 8 **A Unfortunately, there was no time to do that.**
 9 Q All right. Unfortunately, you didn't do it,
 10 right?
 11 **A No, I didn't do it.**
 12 Q Okay. You could have rather than knee struck
 13 him at that point reached over and patted him
 14 underneath his supposedly protruding abdomen to
 15 see if there was a gun if you were worried
 16 about a gun, couldn't you?
 17 **A I -- I -- I suppose.**
 18 Q But you didn't?
 19 **A No, I didn't.**
 20 Q And instead, you let him have it with four or
 21 five very strong knee strikes, right?
 22 **A What do you mean by "let him have it"?**
 23 Q Well, you -- you -- you've put all your struck
 24 behind his back in terms of thrusting it into
 25 his abdomen, area three or four -- excuse me,

171

1 four or five times, right?

2 **A Which was consistent with my DAAT training,**

3 **yes, I did.**

4 Q Okay. And those four, five knee strikes didn't

5 knock anything out of his waistband, did it,

6 even though you were firing your knees at his

7 abdomen just above where his waistband would

8 have been; is that correct?

9 **A Just above the waistband, yes.**

10 Q All right. And those knee strikes caused him

11 to flip over onto his back; isn't that right?

12 **A I don't recall if that's what happened or not.**

13 Q Well, let's run the tape and see if he gets

14 flipped over here.

15 (Video played.)

16 BY MR. TAYLOR:

17 Q Now he's on his back, right, right after the

18 knee strikes? We're at about 56:10, right?

19 He's now on his back. You agree?

20 **A He could be.**

21 Q Well, you can go up and look. He is, isn't he?

22 (Video played.)

23 BY MR. TAYLOR:

24 Q Knee strike, knee strike, knee strike. Now

25 he's on a back, isn't he? His legs are in a V.

173

1 here?

2 **A Yeah. I can move up. Do I need to take the**

3 **mic?**

4 THE VIDEOGRAPHER: No. We've got

5 one. You're okay.

6 BY MR. TAYLOR:

7 Q Now we're at 15:56:10.

8 **A Okay.**

9 Q And we are there. Just before the break, you

10 agreed that that's Burnley on his back with his

11 legs in a V. Could you tell us, are you --

12 looking at that screen on the lower right

13 quadrant, which is what we're focused on now,

14 are you on the left side of the screen to the

15 left of him and which would be his right-hand

16 side at that point?

17 **A Yes, sir.**

18 Q All right. And do you know where Leeman is at

19 this point?

20 **A Across from Mr. Burnley.**

21 Q And did you know that at the time, or are you

22 surmising that from the video?

23 **A No. I recall seeing him across Mr. Burnley's**

24 **body.**

25 Q So when Mr. Burnley was on his back, you -- you

172

1 His legs couldn't be in a V if he wasn't on his

2 side, right?

3 **A Potentially.**

4 Q What do you mean, "potentially"?

5 **A Again, based on the quality of the video, it's**

6 **really hard to definitively say one way or the**

7 **other.**

8 Q Well, let me -- I mean --

9 MR. ELSON: Your microphone.

10 MR. TAYLOR: Oh, my God. What do I

11 do now?

12 BY MR. TAYLOR:

13 Q These are his legs, are they not, in a V?

14 **A Yes.**

15 MR. TAYLOR: Let's take a break.

16 THE VIDEOGRAPHER: We are off the

17 record at 2:23 p.m. This is the end of disk

18 No. 2 in the deposition of Devon Kraemer.

19 (Recess taken.)

20 THE VIDEOGRAPHER: We are back on the

21 record at 2:28 p.m. This is the beginning of

22 disk No. 3 in the deposition of Devon Kraemer.

23 BY MR. TAYLOR:

24 Q Would you like to move up closer to watch, or

25 do you feel you can see it sufficiently from

174

1 could -- you observed Leeman, and he's across.

2 Are you --

3 MR. TAYLOR: At this point, why don't

4 we run the video.

5 MR. ELSON: 'Til when?

6 MR. TAYLOR: Run it for about ten

7 seconds, for about eight or ten seconds.

8 (Video played.)

9 BY MR. TAYLOR:

10 Q Okay. Stop it there. We're at 56:13. His

11 legs aren't moving, right?

12 **A Right.**

13 Q And his body doesn't appear to be moving

14 either, does it?

15 **A I can't speculate to that just based on the**

16 **poor angle of the video.**

17 Q All right. But if his body is moving -- his

18 lower body is not moving, perhaps his upper

19 body is. Is that your testimony?

20 **A Yes, that his upper body could be moving.**

21 Q All right. At this point, which is while he's

22 still on his back, are you -- I know you've

23 stated at some points that at some point you

24 lost your hearing, and you had tunnel vision,

25 and you were exhausted. As we look at this

WIRTH DECLARATION EXHIBIT 4

175

1 while he's still on his back, are you exhausted
 2 and have tunnel vision and can't hear at or
 3 around 56:13 while he's on his back and his
 4 legs are not moving?
 5 **A Well, not knowing what the time stamp was while**
 6 **I was down on the ground, it's hard to really**
 7 **say what's going through my mind at this point,**
 8 **although it is true that I experienced tunnel**
 9 **vision and hearing loss. But based on the**
 10 **video, if you're asking me right now is that**
 11 **going on, I have no way of knowing that.**
 12 Q Well, let me ask you, when -- was he still on
 13 his back when you first felt exhausted and
 14 hearing loss and tunnel vision, or had he been
 15 flipped over onto his stomach?
 16 **A Well, what the video doesn't portray is in the**
 17 **whole time that we're standing at the front of**
 18 **the bus trying to reason with him, my heart is**
 19 **already pounding. I'm recognizing that he's a**
 20 **hostile individual, that we're likely going to**
 21 **have to fight with him. So although I'm not**
 22 **exhausted per se, my body and physiological**
 23 **responses were certainly preparing for the --**
 24 **what ended up being a fight for my life.**
 25 So to answer your question, you know,

177

1 **A It was in the final few seconds before I had**
 2 **made the decision to use deadly force.**
 3 Q All right. So why don't we keep playing.
 4 (Video played.)
 5 BY MR. TAYLOR:
 6 Q All right. Stop. So we're now at 56:17. He's
 7 still on his back, correct?
 8 **A Hard to say one way or the other.**
 9 Q Well, you can still see those two legs, can't
 10 you? They're still in a V position, aren't
 11 they?
 12 (Video played.)
 13 BY MR. TAYLOR:
 14 Q And he just moved his left leg slightly at
 15 56:17, right?
 16 **A That could have been my leg that was moving.**
 17 Q All right. Well, you're on the other side,
 18 though, aren't you?
 19 **A I'm on the left side of Mr. Burnley.**
 20 Q You're on the right side of Mr. Burnley, the
 21 left side of the screen, correct?
 22 **A Yes, yes.**
 23 Q And that's his left leg that just moved at
 24 56:16, isn't it?
 25 (Video played.)

176

1 I don't know right here and right now if I'm
 2 experiencing auditory exclusion, but it
 3 certainly happened in the seconds right before
 4 I shot him.
 5 Q All right. So you're saying you've already got
 6 the adrenaline really pumping based on what
 7 happened while you were attempting to handcuff
 8 him while he was still standing. Is that what
 9 you're saying? All of a sudden, you're already
 10 in the flight or flight mode in your head?
 11 **A It was before that.**
 12 Q So you're in the flight -- fight or flight mode
 13 while you were still on the bus?
 14 **A Yeah. I'm saying my adrenaline was already**
 15 **pumping when he came up and made contact with**
 16 **us, and we were trying to reason with him. It**
 17 **was happening during that time.**
 18 Q All right. And you're saying that some time
 19 between what we're looking at now, you don't --
 20 so you don't know when you first started to
 21 have the failure to be able to hear and having
 22 what you call tunnel vision; is that right?
 23 **A In relation to the video, no.**
 24 Q But in relation to before or after he was on
 25 his stomach, can you tell us when that was?

178

1 THE WITNESS: I would disagree with
 2 that.
 3 BY MR. TAYLOR:
 4 Q What do you think that is? You don't think
 5 that's his leg moving slightly back and forth
 6 at 56:16 and 17?
 7 **A Are we talking about the leg where the cursor**
 8 **is pointing to?**
 9 Q Yes.
 10 **A I'm sorry. I was watching the other leg. I**
 11 **thought that's what you were asking about. Oh,**
 12 **okay. Yes.**
 13 (Video played.)
 14 BY MR. TAYLOR:
 15 Q So from what you can see, are you saying that
 16 during this period of time, Mr. Burnley was
 17 struggling with you?
 18 **A Yes.**
 19 Q And what is he doing that we can't see here on
 20 the video?
 21 **A He is pulling away from us. He's thrashing**
 22 **around. He's using his body and his size to**
 23 **his advantage. Every attempt that I made to**
 24 **control him ended in failure. Every attempt that Officer Leeman**
 25 **and I made to roll him to get him into**

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 12 of 21 Document 49-4

179

1 **handcuffs was countered. We had no control**
 2 **over him at this point in time.**
 3 Q You're trying to handcuff him in the front,
 4 correct?
 5 **A No.**
 6 Q Well, if he's on his back, where are you going
 7 to -- how are you going to handcuff him on his
 8 back?
 9 **A Well, that's the point that I'm trying to make**
 10 **is we were completely unsuccessful in achieving**
 11 **that control to get him in handcuffs and to get**
 12 **him onto his stomach so that we could apply the**
 13 **handcuffs to him.**
 14 Q So you're saying that you were trying to put
 15 him on his stomach here?
 16 **A No. I'm saying that we're trying to position**
 17 **him in a way that we need to apply the**
 18 **handcuffs behind his back.**
 19 Q Well, you could handcuff him in front if he's
 20 on his stomach, he weighs at least 300 pounds,
 21 and you're saying he's struggling with his
 22 upper body, certainly isn't struggling with his
 23 lower body because the video shows no struggle
 24 at least to his waist, let's assume for
 25 purposes of your testimony that you're -- that

181

1 **have been cooperative. But at this point in**
 2 **time, there was no cooperation on his behalf.**
 3 **So even if we wanted to, which we didn't want**
 4 **to, but even if we wanted to, we were not**
 5 **afforded that opportunity.**
 6 Q Well, I thought you didn't answer
 7 hypotheticals, but I guess you did just that.
 8 All right. Let's continue.
 9 (Video played.)
 10 BY MR. TAYLOR:
 11 Q All right. Right there. We're at 56:20. He's
 12 now flipped on his stomach, correct?
 13 **A Yes, sir.**
 14 Q And that is done by Officer Leeman; is that
 15 correct?
 16 **A I know that now.**
 17 Q And did you -- how did you -- At the time, you
 18 knew that he had been flipped on his stomach,
 19 correct?
 20 **A Can you clarify?**
 21 Q Well, at the scene, you were aware that he had
 22 been flipped onto his stomach, correct?
 23 **A No. I recall that I described the whole**
 24 **encounter as extremely violent and that we**
 25 **were all rolling around on the ground.**

180

1 there was some struggle going on in the upper
 2 half of his body with two police officers, one
 3 on each side of him trying to bring his arms.
 4 Why couldn't you just try to handcuff him in
 5 the front since you had him on his back? Why
 6 didn't you just pull his hands together in his
 7 front and cuff him?
 8 **A Per department policy, we're advised that the**
 9 **ideal positioning is behind the back.**
 10 Q Well, you're not in an ideal situation, right?
 11 You're in a situation where the man won't --
 12 according to you, won't comply to be
 13 handcuffed. You wanted to control him.
 14 Wouldn't you be able to control him if you
 15 handcuffed him in front?
 16 **A Had he been cooperative, yes.**
 17 Q Well, were you attempting to handcuff him in
 18 the front?
 19 **A Yes, and he was resisting us.**
 20 Q All right. So you were attempting to handcuff
 21 him in the front?
 22 **A No. To clarify, we were attempting to handcuff**
 23 **him behind his back. But if you're asking me**
 24 **could we have handcuffed him in the front, I'm**
 25 **saying that, yes, we could have if he would**

182

1 Q All right. So you're interpreting what -- at
 2 the time, you interpreted what we see on the
 3 video of Burnley being taken down by Leeman,
 4 then you knee striking him and then him laying
 5 there on his back with his legs V'd and then
 6 his being flipped on his stomach by -- by
 7 Leeman. You -- You thought what was going on
 8 was that he was rolling around on the ground
 9 with you; is that correct?
 10 **A Well, all of us were rolling around, and we**
 11 **were -- Officer Leeman and I were all trying to**
 12 **gain control of Mr. Burnley.**
 13 Q Well, the only time that there was any rolling
 14 that went on was when Leeman took him to the
 15 ground when you knee struck him and then when
 16 Leeman flipped him, right? Otherwise,
 17 Burnley's not rolling. He's laying there;
 18 isn't that right?
 19 **A Well, based on my recollection of being there**
 20 **that day, he was rolling around. He was**
 21 **shrugging us off. He was countering all of our**
 22 **attempts for us to control him. So being there**
 23 **firsthand, that's what my testimony is.**
 24 **Well, if he had seen this video, which you**
 25 **studiously avoided watching until the trial,**

WORTH DECLARATION EXHIBIT 4

183

1 you can concede now that your recollection is
2 inaccurate; isn't that right?
3 MR. WOLFGANG: Object to the form of
4 the question as argumentative. Answer if you
5 can.

6 THE WITNESS: I am not going to
7 answer that.

8 BY MR. TAYLOR:

9 Q You won't answer that one way or the other?

10 **A It -- Again, I am not going to speculate as far**
11 **as what this video maybe shows at this point.**
12 **It just looks like really much of nothing, and**
13 **so I'm only comfortable speaking about my**
14 **experience and knowledge from that day being**
15 **there firsthand.**

16 Q So what we've just been watching to you is much
17 of nothing?

18 **A I am talking about where we're paused right now**
19 **in the darkness and through the window. That**
20 **does not really show much of anything.**

21 Q Well, let's go back a couple of seconds 'cause
22 if it's not much of nothing that Leeman's
23 flipping him right here at --

24 (Video played.)

25 BY MR. TAYLOR:

185

1 **A Yes.**

2 Q All right. And during this time where you say
3 that 80 percent of what's going on even though
4 he looks not to be moving on this video for 10
5 or 15 seconds, you made no effort to Tase him,
6 did you?

7 MR. WOLFGANG: Object to the form of
8 the question. Answer if you can.

9 THE WITNESS: I didn't make any
10 attempt.

11 BY MR. TAYLOR:

12 Q And you made no attempt to use any kind of
13 strikes with a baton, did you?

14 **A I gave him knee strikes.**

15 Q That was previous, though. I'm asking when
16 he's on his back. You made no attempt to Tase
17 him, correct?

18 **A Correct.**

19 Q And you made no attempt to mace him, correct?

20 **A OC him, correct.**

21 Q And you made no attempt to strike him with your
22 baton, correct?

23 **A Correct.**

24 Q All right. And you did not pull your weapon
25 and say "Stop or I'll shoot" did you?

184

1 Q You went back farther. It doesn't really
2 matter. I meant just back to the flip. That's
3 not much of nothing. You can see, right?
4 You're not calling that much of nothing, are
5 you, from 56:10 to 56:19 when we just showed
6 you? That's not much of nothing, is it?

7 **A It doesn't -- I mean, it just shows the flip,**
8 **but it shows maybe 20 percent of what was**
9 **actually going down.**

10 Q Okay. So 80 percent of what was going down
11 isn't -- is happening on the top half of his
12 body. Is that what you're saying?

13 **A That the resistive tension, the things he was**
14 **saying to us. I mean, there was a lot going**
15 **on.**

16 Q Okay. But certainly not enough to use deadly
17 force, right?

18 **A Not quite yet.**

19 Q And, in fact, you didn't pull your gun at this
20 point, right?

21 **A Again, I don't know what the time stamp was**
22 **since I'm completely out of view. I don't know**
23 **what exact positioning I have.**

24 Q You pulled out your gun after the flip, didn't
25 you?

186

1 **A No, I didn't.**

2 Q All right. Okay. Let's go to the flip.
3 (Video played.)

4 BY MR. TAYLOR:

5 Q All right. So the flip is at 20, right? Can
6 we agree on that? He's flipped over on his
7 stomach by Leeman at 56:20. Is that -- Do you
8 agree?

9 **A Yes, sir.**

10 Q All right. And you're still on his left side,
11 right?

12 **A Yes, on the left side.**

13 Q Yeah. You're on the left side of the screen,
14 and now you're actually on his left side 'cause
15 he's on his stomach, correct?

16 **A After the flip, yes.**

17 Q Yes. And before the flip, were you -- were you
18 attempting to get control of his left arm or
19 his right arm?

20 **A I was still, like, holding the left arm, his**
21 **left arm, while I gave knee strikes; so before**
22 **the flip, yes, left arm. And then once he was**
23 **flipped, it was still the left arm that I was**

24 Q So you -- To control his left arm while he's
25 --

WIRTH DECLARATION EXHIBIT 4

187

1 on his back, you're having to reach across his
2 body, correct?
3 **A While he was on his back, well, it would have**
4 **been -- I guess, yeah, it would have been along**
5 **the topside of him because he was, like, rolled**
6 **up partially facing me when I gave the knee**
7 **strikes. So I was positioned, like, positioned**
8 **like this on the side of his body. So I had my**
9 **hands on him to use as leverage against me for**
10 **my strikes.**
11 Q But then after the knee strikes and he went
12 over on his back, then you would have had --
13 you were still on his right side. So to hold
14 his left hand, you would have had to be
15 reaching across his body?
16 **A I don't remember the exact chronological order.**
17 **What I do remember is us rolling around on the**
18 **ground. It was a very uncontrolled movement**
19 **and finally came to a resting position with me**
20 **positioned slightly behind him.**
21 Q All right. By "behind him," you mean behind
22 him in terms of his shoulders? What do you
23 mean by "behind him"?
24 **A Yes, behind his shoulders.**
25 Q By his head?

189

1 at 26:20.
2 MR. ELSON: No, 56.
3 BY MR. TAYLOR:
4 Q 56:20, and this is when he's been flipped.
5 He's just been flipped on his stomach. Now,
6 this is when you say you moved to -- up by his
7 head; is that right?
8 (Video played.)
9 THE WITNESS: Yes.
10 BY MR. TAYLOR:
11 Q And then we hear a pop just at 26:26 -- 56:26,
12 right?
13 **A Yes, sir.**
14 Q That's when you shoot, right?
15 **A Yes, sir.**
16 Q And we hear at 20 -- at 56:23, we hear a guy on
17 the bus say, "Oh, lord. She's going to shoot.
18 She's going to shoot him," or, "He's going to
19 get shot," right?
20 **A Yes.**
21 Q And so even though you said earlier you can't
22 be for sure what he mean, in all likelihood,
23 that's when you pulled your gun, right?
24 **A I can't speculate.**
25 Q Well, tell us when in that six seconds between

188

1 **A Yeah, more towards the upper portion of his**
2 **body.**
3 Q And that was after he was flipped?
4 **A It was after the flip but after we had been**
5 **rolling around trying to gain control, like the**
6 **final position I was in before I shot was being**
7 **more positioned towards the top part of his**
8 **body.**
9 Q All right. And so at the point where he's
10 flipped, is this where you start to have tunnel
11 vision?
12 **A It was in the seconds leading up to the shot.**
13 Q All right. Well, why don't we continue to play
14 then.
15 MR. ELSON: 'Til when?
16 MR. TAYLOR: Let's go 'til 15:26, go
17 for six seconds.
18 MR. ELSON: You mean 56:26?
19 MR. TAYLOR: 56:26.
20 (Video played.)
21 MR. TAYLOR: Go back again. Let's
22 run it one more time.
23 MR. ELSON: You need to say for the
24 record the times.
25 MR. TAYLOR: Record, we're starting

190

1 the time he's flipped and the time we hear the
2 shot at 26:26 (sic), where in that --
3 MR. ELSON: 56:26.
4 BY MR. TAYLOR:
5 Q -- 56:26 where do we -- where do you pull your
6 gun? Is it one second before the pop? Is it
7 three seconds before the pop? Is it -- Did you
8 pull your gun six seconds? As soon as he was
9 flipped did you pull your gun? When was it in
10 that six seconds?
11 MR. WOLFGANG: Object to the form of
12 the question. Answer if you can.
13 THE WITNESS: I can't answer
14 definitively.
15 BY MR. TAYLOR:
16 Q All right. Well, did you pull your gun as soon
17 as he was flipped on his stomach?
18 **A Not that I recall. There was some time because**
19 **I was still trying to gain control of his left**
20 **arm to take it behind his back.**
21 Q All right. So now his -- Let me ask you this.
22 While he's laying on the stomach there --
23 Strike that.
24 While he's laying on his back there
25 for about 15 seconds he -- you're able to see

191

1 his stomach area again, right?

2 **A While I was giving knee strikes.**

3 Q No, after. During the period of time he's

4 laying there with his legs not moving that we

5 watched here for about 15 seconds, during that

6 period of time right there, his stomach is

7 exposed again, right?

8 **A Based on the amount of time that's passed since**

9 **this incident happened, I don't remember a**

10 **detail such as his hoodie remaining up and**

11 **exposing his belly.**

12 Q Well, you could see his waist area, whether his

13 hoodie was up or down, correct?

14 **A Based on the video?**

15 Q Yeah, based on the video.

16 **A No. I cannot identify his stomach in this**

17 **video.**

18 Q Well, where were you looking when he's lying

19 there on his back for 15 seconds?

20 **A I was looking down at him. But I'm saying**

21 **based on the amount of time that's passed from**

22 **the incident, I don't recall if -- I remember**

23 **seeing his belly or if the sweatshirt flipped**

24 **back down based on his movement and all of the**

25 **things he was doing.**

193

1 onto his stomach, there were some things that

2 occurred before you pulled your weapon; is that

3 right?

4 **A While -- I'm sorry. While Burnley was on his**

5 **back?**

6 Q While Burnley -- After Burnley was flipped onto

7 his stomach, what happened next?

8 **A So I was trying -- I was giving him commands to**

9 **stop resisting. I was trying endlessly to free**

10 **the left arm to get it behind his back. Every**

11 **attempt that I made, every, like, slight bit of**

12 **progress I made where I was able to slightly**

13 **get it back, he would buck me off. And then**

14 **finally, the final movement, he had wrestled**

15 **his left arm away from me and made a purposeful**

16 **move to his waistband as he simultaneously**

17 **began to roll up.**

18 Q Okay. So -- All right. You've described quite

19 a bit of -- of activity from the time that he

20 was flipped onto his stomach until you made a

21 decision to pull your gun, correct?

22 **A Yeah.**

23 Q How long was that? How many seconds would that

24 be?

25 **A I have -- I don't know. I wasn't counting.**

192

1 Q During that 15 seconds, you did not see a

2 weapon on his waistband, did you?

3 **A No, I didn't.**

4 Q And you didn't pat him down during this 15

5 seconds from the time after you knee struck him

6 and he went on his back until he was flipped,

7 did you?

8 **A No, given the fact we were trying to get him in**

9 **handcuffs here. Correct.**

10 Q And at this point, you were dealing with his

11 left hand; is that correct?

12 **A Yes, sir.**

13 Q All right. And so are we in agreement then

14 that there was approximately three seconds from

15 the time that you pulled your weapon 'til the

16 time that you shot?

17 **A I -- I don't -- I mean, I don't -- There's no**

18 **way that I can correlate the time stamp from**

19 **this video to what was happening in realtime**

20 **with my experience down on the ground.**

21 Q Okay. From the time -- But we're agreed that

22 you did some things and thought some things

23 before you pulled your gun and fired, correct?

24 **A Can you clarify?**

25 Q Yes, I can. After he was flipped by Leeman

194

1 Q Was it more than five seconds or more than ten

2 seconds?

3 **A I have no way of knowing, sir.**

4 MR. TAYLOR: Okay. Could you read

5 back her answer about what -- Could you,

6 please, read back her answer about what had

7 happened from the time he was flipped onto his

8 stomach until she made a decision to pull her

9 weapon.

10 THE REPORTER: I'll try.

11 (Following answer read.)

12 A So I was trying -- I was giving

13 him commands to stop resisting.

14 I was trying endlessly to free

15 the left arm to get it behind

16 his back. Every attempt that I

17 made, every, like, slight bit of

18 progress I made where I was able

19 to slightly get it back, he

20 would buck me off. And then

21 finally, the final movement, he

22 had wrestled his left arm away

23 from me and made a purposeful

24 move to his waistband as he

25 simultaneously began to roll up.

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 16 of 21 Document 45-4

195

1 BY MR. TAYLOR:
 2 Q All right. When he simultaneously started to
 3 roll up is when you decided to shoot him,
 4 right?
 5 **A Yes, sir.**
 6 Q And I'm asking you again, hearing your own
 7 testimony we read to you, how long did it take
 8 to make those repeated commands and to
 9 endlessly attempt to get his arm out before you
 10 made the decision to shoot him?
 11 **A I can't -- Like I said, I'm not trying to be**
 12 **difficult with you. I just -- I wasn't**
 13 **counting. I -- You know, being down on the**
 14 **ground, it felt like hours. I can't answer if**
 15 **it was five, if it was two. I -- There's no**
 16 **way for me to know.**
 17 Q All right. But you made that decision to shoot
 18 him. You then told him, "Stop resisting, or
 19 I'll shoot you"? You told him you were going
 20 to shoot him if he didn't stop, didn't you?
 21 **A No, I didn't.**
 22 Q You are trained to do that, aren't you?
 23 **A It depends on the situation.**
 24 Q You were about to potentially kill a man,
 25 weren't you?

197

1 his back. You at no time seen a weapon, had
 2 you?
 3 **A No, I didn't.**
 4 Q All right. And during this -- And you also had
 5 a Taser on the opposite side of your belt,
 6 didn't you?
 7 **A On the left side of my body.**
 8 Q Yes. And you could have cross-drawn that
 9 rather than the weapon or the gun, couldn't
 10 you?
 11 **A Based on my positioning and how I was**
 12 **positioned behind Mr. Burnley, no, it wasn't an**
 13 **option.**
 14 Q You couldn't have reached across your body and
 15 pulled out your Taser?
 16 **A No, based on my positioning.**
 17 Q You couldn't have stood up and pulled it out?
 18 **A I -- I guess I could have, but it wasn't --**
 19 **based on the imminence of the situation and how**
 20 **rapidly evolving and the imminent of great**
 21 **danger we were being presented with, there**
 22 **wasn't a thought of disengaging and drawing my**
 23 **Taser because I was in fear of my partner's**
 24 **life and my own. I was afraid I wouldn't have been**
 25 **an appropriate level of force anyway.**

196

1 **A Well, there's been conflicting --**
 2 Q Were you potentially about to kill a man when
 3 you pulled out your gun and decided to shoot
 4 him?
 5 **A Well, there's a high probability of death when**
 6 **you are using a firearm on somebody.**
 7 Q All right. So you had made that decision,
 8 right, at the point that -- after you
 9 repeatedly gave him commands to stop, right?
 10 **A No. The use of deadly force is to stop the**
 11 **threat, not to murder somebody.**
 12 Q All right. But I'm not asking you whether
 13 you -- your intent was to murder him. I'm
 14 asking you whether at the time you decided to
 15 pull your gun and shoot him in the back you did
 16 not tell him that -- to stop resisting or you
 17 would shoot him. You didn't tell him that, did
 18 you?
 19 **A No, but there's more to why that didn't occur.**
 20 Q But you didn't, did you?
 21 **A No, I didn't.**
 22 Q And you didn't even though you hadn't seen a
 23 weapon at any time during the 15 minutes that
 24 you observed him and been in close contact with
 25 him and seen his stomach and seen him laying on

198

1 Q Boy, did you learn how to use all that
 2 terminology in the training academy, what you
 3 just spouted?
 4 MR. WOLFGANG: Object to the form of
 5 the question as argumentative. Answer that if
 6 you can if there's a question there.
 7 THE WITNESS: I -- I -- I don't know
 8 what terminology you're referring to.
 9 BY MR. TAYLOR:
 10 Q Just what you've just said.
 11 MR. WOLFGANG: Same objection.
 12 THE WITNESS: Can you provide
 13 specifics?
 14 BY MR. TAYLOR:
 15 Q No. I'm asking you specifically what you just
 16 said.
 17 MR. WOLFGANG: Same objection.
 18 THE WITNESS: I -- I'm referencing
 19 the terminology that I was trained to use.
 20 BY MR. TAYLOR:
 21 Q Okay. You could have -- you raised -- Where
 22 are you exactly when you -- when you pull your
 23 gun in relationship to Mr. Burnley?
 24 Q And what do you mean by "behind him"?
 25

199

1 **A** He was facing Officer Leeman. Everybody was
 2 down on the ground. Burnley would have --
 3 Mr. Burnley would have been on his left side at
 4 that point, and so I was behind him in the
 5 upper, like, top half of his body.
 6 Q Were you near his head, or were you behind his
 7 head, or where were you with regard to his
 8 head?
 9 **A** I was behind him and somewhere between his back
 10 and his head, his mid back and his head, his
 11 upper body.
 12 Q And he was on -- He was on his stomach, right?
 13 **A** He was facing downward. And then as he
 14 simultaneously rolled up, he started to roll up
 15 onto his left side.
 16 Q Rolled up on his left side, so he's rolling
 17 away from you?
 18 **A** No. He was coming towards me.
 19 Q Well, then how could he be on his left side?
 20 **A** Because he was laying like this and rolled up
 21 this way, so I'm back here. So he rolled up,
 22 and he was coming towards me. He was creating
 23 distance between himself and Officer Leeman.
 24 Q Wait a minute. He was on his stomach, wasn't
 25 he?

201

1 you're trying to say.
 2 **A** He was -- I was trying to get his left arm
 3 behind his back. I was trying to sweep it out
 4 like coming from -- I mean, without having,
 5 like, somebody to do this on, I was trying to
 6 sweep his arm behind his back to get it in
 7 handcuffs. And finally, I was able to get it
 8 slightly behind his back. And, I mean, his
 9 arms were gigantic. So trying to get my hand
 10 in between how he had himself, you know,
 11 resisting and the tension that he had, it was
 12 difficult to do that. You know, when
 13 somebody's resisting arrest, it is very, very
 14 hard to get a resistive person in handcuffs, so
 15 I was having a hard time.

16 And finally, there is a slight bit of
 17 progress. And that final move, he just
 18 immediately with a lot of intent went right to
 19 his waistband as he started to roll up.

20 Q All right. But at that point, you saw nothing
 21 in his waistband?

22 **A** At that point, I was crouched down trying to
 23 free his arm, so I didn't have a view of his
 24 waistband.

25 Q And where was the -- where was your Taser in

200

1 **A** Initially. And like I've said, he started to
 2 roll up onto his left side.
 3 Q From his stomach?
 4 **A** Yes.
 5 Q So if he's on his stomach, you're on his left
 6 side, correct?
 7 **A** Yeah. His head was here, so this would be his
 8 head, and I was over here. Leeman was
 9 somewhere over here, and he began to roll up
 10 onto his left side.
 11 Q That's his right side. No. That's his left
 12 side. You're correct. He rolled up on his
 13 left side. So if he rolled up on his left
 14 side, where was his left hand?
 15 **A** I was trying to grab it to bring it behind his
 16 back, and then he made the purposeful move to
 17 his waistband.
 18 Q How do you know it was purposeful?
 19 **A** Because of the force behind him wrestling it
 20 away from me.
 21 Q Wrestling what away from you?
 22 **A** His entire arm.
 23 Q So during all of this repeated action that
 24 you've described, he's trying to pull his arm
 25 away from you, but -- I don't understand what

202

1 relationship to his body when you were crouched
 2 down?
 3 **A** It was all very close quarters, so I was tucked
 4 down. So essentially, my Taser would have been
 5 buried into, like, my midsection with my vest,
 6 pressing down on it. And I was in close
 7 contact with Burnley, again, trying to sweep
 8 the left arm behind his back, so I was crouched
 9 down. I wasn't, like, up on my knees in a
 10 praying position.

11 Q But you got up on your knees to shoot him,
 12 didn't you?

13 **A** Eventually.

14 Q Eventually. How long afterwards?

15 **A** I -- Again, I can't answer.

16 Q Was it more or less than three seconds?

17 **A** Sir, I -- Again, I -- I can't quantify the
 18 passage of time. Like I said, it felt like
 19 hours that I was down there with him.

20 Q So you could have -- you're telling us that --
 21 In the crouch that you were in or the bend-over
 22 that you were in, you couldn't easily access
 23 your Taser, but you could access your gun, so
 24 you pulled out your gun rather than your Taser, and
 25 you shot him?

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 18 of 21 Document 45-4

203

1 MR. WOLFGANG: Object to the form of
2 the question.
3 BY MR. TAYLOR:
4 Q Is that right?
5 MR. WOLFGANG: Same objection.
6 Answer if you can.
7 THE WITNESS: I can't answer other
8 than my firearm being far more easily
9 accessible considering it was carried on the
10 right side of my body. All I had to do was
11 move my body slightly over to the left and
12 lean.
13 BY MR. TAYLOR:
14 Q Well, couldn't you have moved your body
15 slightly over to the right and pulled your
16 Taser?
17 A **No.**
18 Q Why not?
19 A **Because we were in close quarters contact.**
20 Q Well, you were in close quarters contact with
21 your entire front of your body, weren't you,
22 not just part of it?
23 A **Right. So, therefore, moving over to the right**
24 **or left wouldn't have made a difference with me**
25 **accessing my Taser.**

205

1 **decision, yes.**
2 Q Yes. And so at that point, you -- You
3 straightened up at that point. You could have
4 accessed your Taser, couldn't you?
5 A **Well, given --**
6 Q Yes or no? Could you have?
7 A **No, no, I couldn't have.**
8 Q Why not?
9 A **Because the Taser wouldn't have been an**
10 **appropriate tool to use given my fear for**
11 **Officer Leeman's life and my own.**
12 Q That's not my question. I said physically you
13 could have accessed your Taser once you
14 straightened up, couldn't you?
15 A **I -- I -- I dismissed the use of my Taser, so**
16 **that's why I didn't go for it.**
17 Q That's not my question. I asked you, and do I
18 have to repeat this or do you -- can I -- I
19 asked you, physically when you straightened up,
20 you could have taken your Taser if you made
21 that decision rather than the one you're
22 telling us?

23 MR. WOLFGANG: I object to the form
24 of the question.

25 BY MR. TAYLOR:

204

1 Q Why?
2 A **Because we were in -- I mean, we were, like,**
3 **tucked in with each other, so there wasn't a**
4 **considerable amount of distance.**
5 Q But you could have created some distance if you
6 wanted to, couldn't you?
7 A **Not from my thought process and the imminence**
8 **and concerns for Officer Leeman.**
9 Q I'm not asking you about your thought process.
10 I'm asking you, physically you could have
11 created some distance, couldn't you?
12 MR. WOLFGANG: Object to the form of
13 the question. Answer if you can.
14 THE WITNESS: I can't answer that.
15 BY MR. TAYLOR:
16 Q You could have stood up, correct?
17 A **I guess. I mean, this is all hypothetical.**
18 Q Or you could have -- But you did. It's not
19 hypothetical that you went to your knees to
20 shoot him, right?
21 A **Well, I was on my knees the whole time. It's**
22 **just a matter --**
23 Q But you straightened up, right, to shoot him so
24 that you could position the gun, correct?
25 A **Well, after I had made the deadly force**

206

1 Q Is that right?
2 MR. WOLFGANG: Same objection.
3 Answer if you can.
4 THE WITNESS: I feel as though I've
5 already answered this question several times.
6 BY MR. TAYLOR:
7 Q No, you haven't.
8 A **I don't have anything else to add.**
9 Q All right. Well, let me ask you this then.
10 When you -- When you raised up to your knees,
11 you had made a decision to shoot him, right?
12 A **Right.**
13 Q Okay. And you then pulled your gun, correct?
14 A **After I was up -- further up on my knees?**
15 Q Yes.
16 A **Yes.**
17 Q You pulled a gun. Now, at this point, you're
18 somewhere around his shoulder area, correct?
19 A **Right.**
20 Q And he's rolled up on his left side or his
21 right side?
22 A **He rolled up on his left side.**
23 Q All right. And you then pressed the gun
24 against his back, correct?

25 A **Correct.**

207

1 Q But before you made the decision to raise up,
2 pull your gun and put it against his back, you
3 went through a thought process, correct?
4 **A Can you be more specific?**
5 Q Well, you have given a statement earlier where
6 you said that you thought about using the Taser
7 and dismissed it, correct?
8 **A Yes, sir.**
9 Q And you also have at some point or another said
10 that you made some conclusions about Leeman,
11 correct?
12 **A Yes, sir.**
13 Q And at the time that the flip happened onto his
14 stomach, you couldn't see where Leeman was,
15 could you?
16 **A Based on my positioning and Burnley's size, no.**
17 **Can I go back to my spot over there?**
18 Q Sure. At the time that -- And so from the time
19 of the flip until the time of the shot, you
20 couldn't see Leeman, correct?
21 **A Right.**
22 Q You drew some conclusions during the period of
23 time which is six seconds it appears on the --
24 on the video about Leeman even though you
25 couldn't see him, correct?

209

1 MR. WOLFGANG: Object to the form of
2 the question.
3 THE WITNESS: I'm sorry. Can you
4 repeat the question?
5 MR. TAYLOR: Could you read it back,
6 please? Thank you.
7 (Following question read.)
8 Q So anything that you thought
9 about Leeman was based on your
10 conclusions, not on anything you
11 saw or didn't see, correct?
12 MR. WOLFGANG: Same objection.
13 Answer if you can.
14 THE WITNESS: I can't give you a
15 definitive answer as far as what your question
16 is or what you're looking for me to tell you.
17 BY MR. TAYLOR:
18 Q I'm not looking for you to tell me anything. I
19 think it's fairly clear what I'm asking you.
20 Did you or did you not -- you said that -- On
21 the one hand, you said that Leeman wasn't
22 defending himself. On the other hand, you said
23 you couldn't see him. So how did you know that
24 he wasn't defending himself if you couldn't see
25 him?

208

1 **A Well, I didn't see him defending himself which**
2 **was my greatest concern.**
3 Q Well, you didn't see him at all, right?
4 **A Right, which is --**
5 Q He could have been defending himself. You just
6 didn't see him, right?
7 **A Well, based on the size of Mr. Burnley and the**
8 **fact that Leeman wasn't actively defending**
9 **himself, he appeared to be lifeless and**
10 **essentially had disappeared on the other side**
11 **of Mr. Burnley.**
12 Q Well, let me stop you. You just said you
13 couldn't see him. Then how could he be -- You
14 can't have it both ways. Either you didn't see
15 him, or you saw him and he was lifeless. Which
16 was it?
17 **A I didn't see him defending himself.**
18 Q So you did see him?
19 **A I mean --**
20 Q Did you see him with your eyes or not?
21 **A He was -- essentially had disappeared on the**
22 **other side of Mr. Burnley.**
23 Q So anything that you thought about Leeman was
24 based on your conclusions, not on anything you
25 saw or didn't see, correct?

210

1 **A I think -- I mean, this is -- First of all,**
2 **based on the size of him and my positioning, I**
3 **couldn't see him. Also, he was --**
4 Q The "him," the size of Burnley?
5 **A Yes.**
6 Q You couldn't see Leeman, correct?
7 **A Right, because of my positioning and the fact**
8 **that I couldn't see him led me to believe that**
9 **Leeman was incapacitated or being incapacitated**
10 **by Burnley given the fact that Leeman wasn't**
11 **up, like, kneeling and wasn't in a position of**
12 **advantage.**
13 Q So you couldn't see him, so you drew a
14 conclusion that there was something --
15 something had happened to him?
16 **A Yes, sir.**
17 Q Okay. But you had nothing other than not being
18 able to see him that led you to that
19 conclusion. Is that fair to say?
20 MR. WOLFGANG: Object to the form of
21 the question. Answer if you can.
22 THE WITNESS: I -- I don't -- I mean,
23 I don't know what else I can add.
24 BY MR. TAYLOR:
25 Q Well, did you see -- Did you see Burnley

WIRTH DECLARATION EXHIBIT 4

211

1 choking Leeman?

2 **A No.**

3 Q Did you see Burnley going for Leeman's gun?

4 **A No.**

5 Q Did you see whether Leeman had pulled his gun

6 or not?

7 **A No.**

8 Q During that time from the flip until you shot

9 Mr. Burnley, the flip being onto the stomach,

10 during that period of time, did you have tunnel

11 vision?

12 **A In the seconds leading up to before I used**

13 **deadly force.**

14 Q You did?

15 **A Yes.**

16 Q And you lost your hearing as well, correct?

17 You didn't -- You couldn't hear?

18 **A I noticed that things started to become**

19 **muffled, and it was clear my body was beginning**

20 **to shut down.**

21 Q All right. So you were -- your body was -- You

22 were having what you perceived to be fatigue

23 problems, correct?

24 **A Exhausted.**

25 Q Exhausted. Despite your physical conditioning

213

1 **A No.**

2 Q Now, you've said both here and previously that

3 you made a conscious decision not to use the

4 Taser, right?

5 **A Correct.**

6 Q And you made that decision because you felt, at

7 least in your initial position, you couldn't

8 access it easily, correct?

9 **A That's one of a few things.**

10 Q But, in fact, you could have accessed it if you

11 changed your body position, correct?

12 **A Speculation. Can't answer one way or the**

13 **other.**

14 Q Well, could you have changed your body

15 position?

16 **A Speculation. I -- there's -- I can't say what**

17 **I may have done or should have or could have.**

18 **I'm really not trying to second-guess my**

19 **decision that I made.**

20 Q I'm asking you a simple question, not to

21 second-guess. I'm asking you. You were there.

22 Were you frozen, or could you have moved your

23 body?

24 **A I -- I guess I could have.**

25 Q But you made a decision not to move your body

212

1 and training, your physical training, you felt

2 exhausted, right?

3 **A Based on the subject outweighing me in a**

4 **significant manner, absolutely.**

5 Q Okay. And by "tunnel vision," tell me what you

6 meant.

7 **A I could feel things starting to close in, like**

8 **my peripheral vision was going dark, and I**

9 **could feel things narrowing in on me.**

10 Q All right. And in terms of not hearing, you --

11 if Leeman had said something to you, you

12 wouldn't -- you wouldn't have necessarily have

13 heard it, correct? Is that what you mean by

14 you weren't able to hear?

15 **A It probably would have made it more difficult**

16 **for me to hear anything he was saying.**

17 Q So sounds were muffled?

18 **A Right.**

19 Q So if Leeman had said to Burnley something

20 along the lines of, "Stop, or she'll shoot,"

21 you wouldn't have heard it?

22 **A That's speculation. I can't say one way or the**

23 **other.**

24 Q Well, did you hear Leeman say anything like,

25 "Don't shoot him"?

214

1 and use the Taser, right?

2 **A I think this is going in far greater detail**

3 **than what I was experiencing in this moment.**

4 **In a situation like this, your thoughts are not**

5 **as clear as, "Well, maybe I should move my**

6 **right knee, maybe I should move my left knee,**

7 **or maybe I should scoot this way." So,**

8 **unfortunately, you know, the thoughts that I**

9 **recall were just very fragmented and deeply**

10 **concerned for my partner's life.**

11 Q Even though you didn't know where he was or

12 what he was doing?

13 **A I already answered why all of that was going**

14 **on.**

15 Q Okay. But you are an experienced, trained

16 police officer, correct?

17 **A Yes.**

18 Q And you had used your Taser on many occasions

19 previously or at least used it to hold it,

20 correct?

21 **A Yes.**

22 Q And you had been able to use less-than-deadly

23 force in other situations where there were

24 people who were bigger than you, correct?

25 **A Less than deadly force, you said?**

WIRTH DECLARATION EXHIBIT 4

Case 2:19-cv-00364-JPS Filed 11/01/19 Page 21 of 21 Document 45-4